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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 684

BEN R. HARRIMAN, JERRY SINER AND FRANK LOUIS DE ROSA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1A) is not yet reported. The unreported opinion of the district court appears at pages 73–78 of the record.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1955 (Pet, App. 3A). The petition for a writ of certiorari was filed on March 30, 1955. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioners were indicted for embezzlement from a member bank of the Federal Reserve System under the statute punishing embezzlement either from such banks or from banks insured by the Federal Deposit Insurance Corporation (18 U. S. C. 656). Following announcement by the government at the start of the trial that it was prepared to prove that the bank was insured by the F. D. I. C. but that it was not a member of the Federal Reserve System, the indictment, on motion of petitioners was dismissed. The question is whether the denial of petitioners' subsequent motion for acquittal was appealable.

STATUTE AND RULES INVOLVED

18 U. S. C. 656:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent,

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officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Rule 29 (a), F. R. Crim. P.:

Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may

offer evidence without having reserved the right.

Rule 48 (a) F. R. Crim. P.:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of New York on a twenty-five count indictment, No. 140–65 (R. 2–8), which charged embezzlement and conspiracy to embezzle from "a member bank of the Federal Reserve System", the Royal Industrial Bank of New York. A second indictment, No. 140–66, with which the first was consolidated for trial, alleged similar offenses, involving monies taken from the Trade Bank and Trust Company by petitioners Harriman and Siner and one Herbert Shniper (Pet. 2, R. 1).

During the testimony of the first government witness, the government offered in evidence a certificate that the Royal Industrial Bank was insured with the Federal Deposit Insurance Corporation (R. 12). The defendants objected to the admission of this certificate on the ground that indictment 140–65 alleged that the bank was a member of the Federal Reserve System rather

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than a bank insured by the Federal Deposit Insurance Corporation (R. 13, 17). The government filed a motion to conform the indictment to the proof, which was later withdrawn (R. 22–24). Petitioners then moved "to dismiss indictment C–140–65, on the ground that it appears without question from the admission made by the Government that an essential allegation in that indictment, namely, that the employee is employed by a member bank of the Federal Reserve System, cannot be proved" (R. 24). The court heard argument on that motion which dealt largely with the question of whether the variance would be fatal (R. 29–51). The next day the court stated that it would be futile to proceed with the taking of evidence since the government could not prove the charge of "that particular indictment, which is not to say that the Government might not have the evidence if there were a re-indictment." (R. 54.) When petitioners' counsel asked whether the court was ruling on the motion to dismiss Indictment No. 140–65, the court stated, "I don't believe that at the present status of this case I have any authority to grant such a motion because the case is not at a conclusion" (R. 54). He indicated readiness to proceed on case No. 140–66, but counsel for a defendant in that case moved for a mistrial on the ground that evidence already received was not relevant as to him (R. 55–56).

After argument the court indicated that he was ready to grant a mistrial in case No. 140–66 (R. 56–67), and then granted the motion to dismiss Indictment No. 140–65 (R. 67). Thereafter counsel for Harriman moved for a judgment of acquittal under Rule 29 in No. 140–65 (R. 67), but the court stated it did not want to be interrupted at that point (R. 68). It granted a mistrial in No. 140–66 (R. 69). Counsel then renewed the motion for judgment of acquittal, as to which the court reserved decision, pointing out, however, that it had already ruled on the dismissal of the indictment before any motion for acquittal was made (R. 70–71). Subsequently the court denied the motion for acquittal (R. 73–78) holding that, by making a motion to dismiss the indictment, petitioners had consented to a dismissal of the indictment during trial, and that the situation was the same as if the United State had moved for dismissal of the indictment during trial under Rule 48 (a) and petitioners had consented thereto (R. 77). An appeal to the court of appeals was dismissed on the authority of *United States* v. *Shelley,* 218 F. 2d 157 (C. A. 2) (Pet. 1A–2A), in which that court had held that one who had successfully moved to have an indictment dismissed for lack of proof as to venue had no appealable interest.

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ARGUMENT

The record is clear that petitioners made no motion for a judgment of acquittal until after the court had granted their motion to dismiss the indictment. This particular case against them was therefore ended before they made the motion for judgment of acquittal. The issue is not, as petitioners seem to think, whether the denial of their motion was appealable as a final order (Pet. 7–8). The point is that, even though the order was final, petitioners, having secured the relief which they sought, had nothing about which to complain and therefore no appealable interest. Hence their appeal was properly dismissed. See *Lewis* v. *United States,* 216 U. S. 611; *United States* v. *Shelley,* 218 F. 2d 157 (C. A. 2).

Petitoners argue (Pet. 12–13) that, since their motion to dismiss was based on the evidence adduced, the court should have treated it as a motion for acquittal under Rule 29 (a), regardless of what they termed it. The record is clear, however, that none of the parties considered petitioners' motion as one for judgment of acquittal, and we cannot tell how the judge would have ruled had he thought he was ruling on a motion for acquittal. As the court pointed out in its opinion on the later motion for acquittal (R. 77), the situation it had before it when it ruled on the motion

to dismiss was more like a motion under Rule 48 (a) which can be granted after trial has begun only with the consent of the defendant. While the government had not actually moved to dismiss, petitioners, by moving to dismiss, had given the consent which is the essential requirement under Rule 48 (a). A judgment of dismissal therefore did not violate any rights of the petitioners.

It is evident that the sole purpose of petitioners' insistence on a judgment of acquittal rather than dismissal is to enable them to raise a defense of double jeopardy to any new indictment describing the bank as one insured by the F. D. I. C. While that question is not here, it would seem that, even if the judgment were designated as one of acquittal, petitioners would not be in a position to assert that the new indictment charged the same offense as the first, when they themselves had won dismissal on the ground that the difference in the allegations was material. See *Salta* v. *United States,* 44 F. 2d 752 (C. A. 1). Cf. *Burton* v. *United States,* 202 U. S. 344, 378, where this Court ruled that a senator's acquittal on a charge of having received forbidden compensation from a specified person who was an officer of a corporation was no bar to prosecution on an indictment charging receipt of the compensation from the corporation. There is thus no reason for this Court to resolve the immaterial issue of appealability raised by petitioners.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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